

1 that we need to get done.

2 JUDGE SIPPEL: Well, I want to
3 get into that now. But how does NFL feel
4 about that?

5 MR. LEVY: I'm not sure I
6 understand what Mr. Toscano has proposed. But
7 let me just say that there is a certain logic
8 to the schedule as you have tentatively
9 outlined it, with the NFL on April 14th,
10 Wealth TV on April 21st, and MASN on May 5th.
11 That allows two weeks for the Wealth TV cases,
12 where it's just really a consolidation of four
13 separate cases. And to me that makes some
14 sense. It provides two weeks. If what Mr.
15 Toscano is suggesting is that the NFL case be
16 pushed into May, no I don't - given where we
17 were yesterday at 3:00 o'clock, which is
18 urging Your Honor to have a hearing in early
19 March, that is not acceptable.

20 But I think the April 14th approach
21 does make sense. It accommodates the need for
22 some extra time in the schedule to accommodate

1 the four Wealth TV cases, and it allows the
2 MASN case to go forward on the date that the
3 parties had agreed.

4 JUDGE SIPPEL: Yes, sir.

5 MR. BECKNER: Yes. I hadn't
6 recognized you. I don't know what happened
7 between Liberty and here.

8 JUDGE SIPPEL: I guess I changed
9 as much as you did.

10 MR. BECKNER: Hopefully not. Ten
11 years is just a blink of an eye, right?

12 I don't know where you latched
13 onto the notion that a little slippage in the
14 time required to try the NFL case translates
15 into a week delay in trying the Wealth case.

16 It seems to me that if the NFL
17 case starts on the 14th, maybe it takes a day
18 longer than people anticipate, then we just
19 start the Wealth case a day later, not a week
20 later.

21 And I don't think - I can't see
22 how that should cause any distress to anyone.

1 It sure looks like the way it seems to make
2 sense for everybody in these cases is to start
3 the NFL case on the 14th, have the 21st as the
4 target date to start the Wealth case. If the
5 NFL case goes over a little bit, it's not
6 going to go over more than a day. So we start
7 the Wealth case on the 22nd.

8 We don't know that the wealth case
9 is going to take a full two weeks; it may take
10 a day less than that or whatever. But I think
11 the idea that we are in some sort of gridlock
12 about the possibility that a case may take a
13 day more or less longer to try than we
14 anticipate is just not where we want to be.

15 MS. WALLMAN: Your Honor, if we
16 had some confidence that it was a matter of a
17 day or two, and we'd be starting on or about
18 April 21st, then my objection would be met.

19 MR. MILLS: Well, that's what we
20 are hearing. That's the kind of assurance
21 that is pretty much all you can get in a trial
22 setting like this. We are not trying to solve

1 the long delay that Wealth TV is describing of
2 over a year. That's not what we - we can't
3 solve that here. We are just trying to figure
4 out which week, which Monday, is right. '

5 JUDGE SIPPEL: That's exactly why
6 I'm here.

7 All right, well, I'm going to take
8 this on face value. And clearly to me, here
9 is what makes sense to me. NFL on the 14th of
10 April, Wealth TV parties on the 21st, and MASN
11 on May 5th. That's how I see it. It just
12 makes all the sense in the world.

13 Now what I want done is, I want
14 the dates to be filled in, in other words, in
15 getting ready for NFL, what is going to be
16 done leading up to NFL as we had in the
17 discovery order that started this process out.

18 MR. COHEN: Your Honor, you have
19 that of course with the other two cases. We
20 have given you a complete order, and I think
21 they are just a week apart.

22 MR. LEVY: Your Honor, if I can

1 suggest that Mr. Toscano and I later in the
2 day can get together, I'm confident we can
3 work those dates out. And if we can send you
4 an email later in the day I don't anticipate
5 a problem.

6 JUDGE SIPPEL: Well, that's
7 exactly what I'd like to do. And since
8 basically you can break it down into - I may
9 be oversimplifying - but I would think that
10 you could break it down into three orders, one
11 controlling the NFL cases - I have to keep all
12 this in my head.

13 MR. MILLS: Well, one thing that
14 may help is, since we have agreed on the date
15 that actually was in our proposed order for
16 all the Wealth defendants, which was proposed
17 by counsel for Wealth TV, and all the dates
18 were already in there, it models after your
19 previous order. That is already set.

20 And I think the same would be true
21 for MASN since they were counting on starting
22 on May 5th. So as to those four cases and the

1 MASN case, that should be set. And then if
2 Mr. Levy and Mr. Toscano can work out the NFL
3 case and send that to you, then that would
4 seem to make the rest of it easy.

5 JUDGE SIPPEL: But you agree with
6 me that there should be three separate orders?

7 MR. MILLS: Yes.

8 MR. LEVY: Yes.

9 MR. COHEN: We have given Your
10 Honor an order to sign for Wealth that mirrors
11 your earlier order with all the intermediate
12 dates.

13 JUDGE SIPPEL: You've got the
14 Time-Warner?

15 MR. COHEN: Yes.

16 JUDGE SIPPEL: That is already
17 with me.

18 MR. COHEN: Yes. And it starts
19 on the 21st of April, the day that you have
20 just set, and Ms. Wallman has essentially -
21 has agreed, and we have the dates. So we have
22 an agreement with the parties and the dates,

1 and Your Honor can sign that order, unless Ms.
2 Wallman, I think she has reviewed it.

3 MS. WALLMAN: I have no
4 objections.

5 JUDGE SIPPEL: That starts on the
6 27th and it goes through 21 April, correct?

7 MR. COHEN: 21 April, yes, Your
8 Honor.

9 MR. SOLOMON: And for MASN,
10 Comcast and MASN, we haven't done it as a
11 draft order, but we have given you the dates.
12 I think the only thing we didn't include as I
13 recall was the dates for proposed findings,
14 which you can just copy from the prior order.

15 JUDGE SIPPEL: What I'm going to
16 ask you to do is -

17 MR. SOLOMON: You want a draft
18 order?

19 JUDGE SIPPEL: Yes, please.

20 MR. SOLOMON: We will get you a
21 draft order.

22 JUDGE SIPPEL: It makes it easier

1 for me to keep things straight. And so that
2 leaves another draft order for MASN. Or was
3 that MASN that you were talking about?

4 MR. SOLOMON: Yes, that was MASN.

5 JUDGE SIPPEL: Well what am I
6 left with? NFL?

7 MR. LEVY: Yes. And we will get
8 something to you no later than 9:00 or 10:00
9 o'clock tomorrow morning, how is that?

10 JUDGE SIPPEL: Well, I won't be
11 here, by that's fine.

12 MR. LEVY: If we can get it to
13 you today, we'll get it to you today.

14 JUDGE SIPPEL: Well, I'll
15 probably sign this one today, this one being
16 the Time-Warner. It's all set to go.

17 Is this what the Commission said
18 to call this thing? They had some kind of a
19 way of - I want to do what I'm supposed to do.

20 MR. SOLOMON: They called it,
21 Your Honor, they called it further revised
22 procedural and hearing order.

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1 JUDGE SIPPEL: Ah, that's
2 beautiful. And don't worry about yours, who
3 am I getting this from?

4 MR. COHEN: Mr. Harding.

5 JUDGE SIPPEL: Mr. Harding, don't
6 worry about these. I will make a modification
7 on that one, that's all set to go. And I'll
8 just tackle it, I'll call it something
9 different here.

10 MR. HARDING: We can send that in
11 Word if that would be helpful.

12 JUDGE SIPPEL: Pardon?

13 MR. HARDING: We can send that in
14 Word if it would be helpful.

15 JUDGE SIPPEL: Yes , it would be.
16 It would be.

17 MR. SOLOMON: We and MASN will
18 get you a joint proposed order.

19 JUDGE SIPPEL: Well, certainly it
20 will be out - all this will be out no later
21 than Monday, I can assure you of that. I'm
22 just not going to be around tomorrow.

1 But whatever I can do I will do.
2 Getting an order out today on today's
3 subpoena, trying to show the Commission that
4 I can really expedite.

5 Okay, that leaves us now, now that
6 leaves us the tough questions. That is, the
7 scope of the - two questions, the scope of
8 discovery, and the use of live witnesses on
9 direct.

10 And the reason that - on the
11 second point, the reason I want to revisit
12 that is because I don't mind so much parties
13 putting themselves in a bind, but I'm kind of
14 in a bind now. And I know how - I know it's
15 a pleasure really to sit here and preside over
16 real professional presentation on direct
17 testimony live. And I don't doubt that it
18 couldn't be done.

19 But there is no question that it
20 does take more time. And sometimes I'm the
21 culprit, interrupting for clarification.

22 I would prefer, I would really

1 prefer strongly, that all these witnesses be
2 handled by what we call the written direct,
3 and I want to - I know you feel rather
4 passionate about this, but you understand what
5 my situation is. I don't have any problem,
6 believe me, if the Commission said as soon as
7 practicable even. But they want this as soon
8 as possible.

9 MR. SOLOMON: We're comfortable
10 with Comcast filing a written direct. We
11 still would potentially want to have for some
12 of the witnesses an oral presentation, but
13 consistent with what you had said before, we
14 would make every effort to keep that very
15 brief.

16 JUDGE SIPPEL: So some witnesses
17 you would go with the written -

18 MR. SOLOMON: I think the concept
19 would be that we would submit written direct.

20 MR. BLAKE: For all, right? For
21 all witnesses?

22 MR. SOLOMON: For all witnesses.

1 JUDGE SIPPEL: Oh, for all
2 witnesses.

3 MR. SOLOMON: But then as we put
4 the witness on the stand we might want them to
5 briefly summarize their written direct, so
6 that it would just - they would have an
7 opportunity to describe their testimony and
8 then go into cross.

9 MR. LEVY: We are comfortable
10 with that as well.

11 JUDGE SIPPEL: It would be sort
12 of like a preliminary to the cross. I mean
13 he's up there for cross, or she, but basically
14 you want to just - and that helps me, put it
15 in context basically. And there is no
16 objection?

17 MR. LEVY: No objection.

18 MR. FREDERICK: MASN doesn't
19 object to that.

20 MS. WALLMAN: Nor does Wealth TV.

21 JUDGE SIPPEL: Okay, we're making
22 progress.

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1 Now discovery, then, discovery,
2 discovery. What - you just explained to me,
3 or MASN counsel just explained to me in a very
4 graphic way what's been done on these cases,
5 or I guess not all of these cases, but there's
6 a - and who did not go? Who did not go before
7 the arbitrator?

8 MR. FREDERICK: Your Honor, that
9 case was just MASN and Time-Warner.

10 MR. COHEN: MASN and Time-Warner
11 only, Your Honor.

12 MR. HARDING: None of these cases
13 have been before an arbitrator; none of
14 Comcast cases have been before an arbitrator.

15 JUDGE SIPPEL: All right, then I
16 can't rely on MASN what you said in terms of
17 discovery. Well what about Time-Warner and
18 MASN - all right, now, so what does that leave
19 us with? How much discovery - and you have to
20 - that Commission, it's as binding on you as
21 it is on me.

22 MR. COHEN: Your Honor in the

1 Wealth cases we have agreed upon discovery.
2 We have a schedule. We have a schedule for
3 document discovery. We are going to do expert
4 depositions only; we are not going to do fact
5 depositions. But we've agreed upon the
6 schedule of discovery.

7 We had several long discussions
8 about documents. We have one or two little
9 small issues to iron out. We have a call
10 schedule with Ms. Wallman for tomorrow at 3:00
11 o'clock.

12 So I don't think that there is an
13 issue with respect to discovery in the Wealth
14 cases.

15 JUDGE SIPPEL: Well, the only
16 proverbial at the party is Comcast?

17 MR. SOLOMON: I'm not sure there
18 are disputes. I guess I would leave it to the
19 complainants. I can speak to the MASN case.
20 We've had discussions. We had a call
21 scheduled this afternoon, and certainly I
22 would hope that we would continue to work

1 constructively and resolve things consistent
2 with the orders that you have issued.

3 MS. WALLMAN: Your Honor, I agree
4 with Mr. Cohen's characterization, except that
5 I would not want to guarantee that these
6 issues are small. We are talking about
7 exchanging affiliate agreements. Some of them
8 have - all of them confidentiality provisions
9 that have to be dealt with with the
10 distribution partners, and so I can't promise
11 that there won't be things that we need to
12 consult further with each other on and perhaps
13 before you.

14 MR. LEVY: Your Honor, in the NFL
15 network Comcast proceeding there were a couple
16 of issues. And the truth of the matter is
17 that the meet and confer process was
18 interrupted in December when the question of
19 how we were going to proceed in this matter
20 became uncertain.

21 There are outstanding document
22 requests and objections. We have not had a

1 chance to work those through. Our position
2 quite frankly - we have no dispute with the
3 need or the desirability for depositions of
4 expert witnesses. Our position is that there
5 is no need for depositions of fact witnesses.

6 In the related litigation Comcast
7 has already had a deposition of our principal
8 fact witness at the hearing. They have
9 already taken his deposition on issues within
10 the scope of this proceeding.

11 JUDGE SIPPEL: Well, you mean
12 when it was - before it became an ALJ hearing?

13 MR. LEVY: No, Your Honor. There
14 was a - there was pending litigation in New
15 York State.

16 JUDGE SIPPEL: Oh, New York
17 State, okay. Does that cover the 616 issue,
18 by the way?

19 MR. LEVY: It does not cover the
20 616 issue. But in that case MASN served a
21 deposition notice in this proceeding as well
22 as that proceeding - or excuse me, Comcast.

1 We didn't object to questions being posed to
2 that witness.

3 We don't think depositions of any
4 other fact witnesses are appropriate or
5 required, especially in light of the fact that
6 there is going to be written testimony; there
7 is going to be ample notice to the other side
8 on what that testimony is going to look like
9 before the hearing.

10 We may be back to Your Honor to
11 talk about the scope of document discovery,
12 but it appears that there are some
13 differences, but frankly, we have not gotten
14 far enough along in our discussions to know
15 what the scope of those differences are going
16 to be.

17 JUDGE SIPPEL: Is NFL the only
18 one that is concerned about the scope of
19 documents at this stage?

20 MR. FREDERICK: No, I would say
21 MASN is as well. But we pledged to meet and
22 confer this afternoon with Comcast, and we are

1 not prepared to bring to you a specific
2 disagreement about the scope of document
3 review. We concur with the NFL network that
4 it is not necessary for fact witness
5 depositions to be taken in the case, just
6 because of the nature of the issues.

7 JUDGE SIPPEL: That's really not
8 your call. I mean the rules provide for
9 depositions. Under the circumstances of the
10 case there might be reason to curtail it, but
11 not that reason.

12 Now who else do I have to hear
13 from on this?

14 MR. BECKNER: I apologize for
15 interrupting the discussion on this issue.
16 But whenever you are done with it, I want to
17 go back to the live direct issue. Because
18 there is a sequencing issue that I want to
19 bring your attention to.

20 JUDGE SIPPEL: Okay, I'm sorry,
21 we will go back to that.

22 MR. BECKNER: I apologize for

1 being slow.

2 JUDGE SIPPEL: We're ten years
3 older, so it's okay.

4 Who's next on this side?

5 MR. TOSCANO: On the depositions of
6 fact witnesses, Your Honor, I think the
7 depositions of fact witnesses are critical.
8 As you pointed out, and as I believe Judge
9 Steinberg also pointed out, effective
10 efficient cross-examination depends on having
11 deposed a witness.

12 The NFL has put in declarations
13 from a number of witnesses. There are a
14 number of other witnesses whose testimony is
15 relevant to this. We found in the New York
16 State litigation that the depositions just
17 like the document discovery are critical in
18 coming up with the evidence that undermines
19 the litigation position of the NFL.

20 We've taken one single deposition
21 in this proceeding with NFL fact witness.
22 Just to give you an example, one of the - the

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1 NFL in its pleadings has repeatedly insisted
2 that the NFL Networks programming is not niche
3 programming. But when we asked the declarant
4 about this, he - the only one again who has
5 been deposed in this matter - he testified
6 that the NFL programming is extremely
7 appealing to a niche of viewers. It's a
8 perfect example of how when you actually get
9 the opportunity to test the witnesses, it's
10 not always the same as the NFL's litigation
11 position, and it often gives us ammunition to
12 show that their litigation position is nothing
13 more than that.

14 MR. LEVY: But Your Honor, Mr.
15 Toscano is going to have that opportunity to
16 cross examine witnesses at the hearing based
17 on their written testimony. And I assume in
18 any event there is no justification for taking
19 the depositions of fact witnesses who are not
20 going to be offered as fact witnesses in this
21 proceeding. Otherwise we are going to be in a
22 situation where we are going to have no limits

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1 on the number of depositions that can be
2 taken.

3 At the earlier hearing where we
4 discussed the issue of depositions, you put
5 great emphasis on the fact that no one should
6 show up at the hearing and be surprised by a
7 witness' testimony. And I recognize that.
8 Part of that problem is solved if you have
9 written direct, but that consideration does
10 nothing to support the notion that there ought
11 to be depositions of witnesses who aren't
12 going to be declarants in the proceeding.

13 JUDGE SIPPEL: Well, that's what
14 discovery is all about, isn't it? I recognize
15 there is a risk to that.

16 Here's what I'm going to do. I'm
17 going to require a schedule filed by whoever
18 is going to take depositions. That will be
19 Comcast and Time Warner too?

20 MR. COHEN: No, Your Honor.

21 JUDGE SIPPEL: It's just Comcast
22 that wants the deposition?

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1 (Simultaneous speakers.)

2 JUDGE SIPPEL: Well, I want a
3 schedule on Monday by 12:00 noon on when and
4 who you want to take - to depose, rather, and
5 the purpose for it.

6 MR. COHEN: Okay.

7 MR. SOLOMON: Your Honor, can I
8 ask you one question about that? It's that
9 when may relate to just working out dates with
10 other counsel. I mean if we give you - I'm
11 not trying to be difficult, but if we give you
12 the who and the why, would that be sufficient?
13 And then we work out the dates?

14 JUDGE SIPPEL: Who and why,
15 that'd be fine. That would be one of the
16 reasons to depose. Indicate of course whether
17 or not it's going to be a witness that either
18 you intend to call at the hearing or NFL or
19 the other parties have indicated they are
20 going to call. In other words, fact witness
21 versus testifying witness.

22 MR. SOLOMON: Can I also ask to

1 the extent that given your order that fact
2 witness depositions could be taken, are you
3 also asking that MASN and NFL submit a list of
4 any fact witness depositions they intend to
5 do?

6 MR. LEVY: We're prepared - what
7 I suggest, Your Honor, is that we be afforded
8 the opportunity to see the scope and the
9 purpose of their depositions and then to
10 respond several days later, both addressing
11 whether or not there is a need for the
12 depositions they propose, and the depositions
13 that we would call for in response.

14 JUDGE SIPPEL: In other words
15 your universe of - as you are sitting here
16 today your universe of depositions that you
17 have in mind or possibly in mind, might become
18 a little decreased in number depending on the
19 outcome of their -

20 MR. LEVY: Your Honor, I want to
21 be very candid about my views on this. I
22 think as apparently do the parties in the

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1 other proceedings, that there is no need for
2 fact depositions here. The issues are
3 straightforward. They are simple. They are
4 prescribed by the hearing designation order if
5 nothing else.

6 But if Comcast is going to go on a
7 broad ranging search for evidence from NFL
8 Network related witnesses, then I am going to
9 be under great pressure to do the same.

10 JUDGE SIPPEL: Wait a minute,
11 just to get even?

12 MR. LEVY: No, because that would
13 reflect the fact that the scope of the
14 proceeding and the scope of the issues that
15 they intend to address at the hearing is
16 broader than the scope of the issues and the
17 scope of the proceedings that I - that our
18 planning has been premised upon.

19 JUDGE SIPPEL: Okay, so you are
20 going to get a list of their witnesses - I
21 mean, I'm sorry, a list of the targets to
22 their depositions, the persons to be noticed

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1 for depositions. And you're going to get a
2 reason as to why they want to take those
3 depositions, and the question becomes then one
4 of relevance. So if they are trying to - and
5 the next step I was going to take was to
6 require you to file a motion for a protective
7 order under the rules if you feel that that is
8 too extensive.

9 MR. LEVY: That's fair enough.
10 We will be prepared to do that.

11 MR. TOSCANO: Your Honor, it's
12 unfair, though, to make us go forward with the
13 witnesses we want to depose and not make them
14 go forward with the witnesses they want to
15 depose at the same time. If they want to say
16 we don't want to depose any witnesses, that's
17 fine. But then for them to come back and say,
18 oh by the way, we want to get even as you
19 said.

20 MR. LEVY: Can I offer a
21 suggestion here, Your Honor.

22 JUDGE SIPPEL: Hold on just a

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